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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED

1. Does ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), require an employee benefit plan to identify specific individuals within the sponsoring organization who have authority to amend the plan, or otherwise require an amendment procedure more detailed than that contained in a plan that expressly reserves the sponsor's right to amend the plan?

2. Does a procedural noncompliance with ERISA causing no harm to plan participants—here, the Court of Appeals held that a plan's amendment provisions were insufficiently specific under ERISA § 402(b)(3)—give rise to a substantive remedy—here, striking an amendment from the plan document to invalidate a termination of nonvested welfare benefits?

PARTIES TO THE PROCEEDING

All parties to the proceedings below are parties before this Court. The named respondents are Frank C. Schoonejongen, Wesley L. Losson, John S. Dunning, William Martone, William V. Hanzalek, Edward F. Ziek, Melvin Deblock, Joseph Colquhoun, Joseph Majerscak, Gerard Abbamont, and Olga Wolsey. The named respondents represent a class consisting of retired, nonbargaining unit employees from the petitioner's Wood-Ridge, New Jersey, facility.

The petitioner is Curtiss-Wright Corporation. Pursuant to Rule 29.1 of the Rules of the Court, petitioner states that it has no parent or subsidiary corporations (except wholly owned subsidiaries).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Curtiss-Wright Corporation respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 3, 1994.

OPINIONS BELOW

The opinions of the United States District Court for the District of New Jersey are not reported. (App. 34, 42).[1] The original opinion of the United States Court of Appeals for the Third Circuit issued December 28, 1993, its March 3, 1994

[1] "App." refers to the Appendix to this Petition. "J.A." refers to the Joint Appendix filed with the Third Circuit.

order granting rehearing and vacating its original opinion, and its March 14, 1994 order denying the suggestion for rehearing in banc are unreported. (App. 17, 107, 109). Its final opinion is reported at 18 F.3d 1034. (App. 1).

JURISDICTION

The original opinion of the Court of Appeals was entered on December 28, 1993. (App. 17). A petition for rehearing, filed January 11, 1994, was granted by order entered March 3, 1994, vacating the original judgment. (App. 107). The suggestion for rehearing in banc was denied by order entered March 14, 1994. (App. 109).

The judgment of the Court of Appeals as to which review is sought was entered on March 3, 1994. (App. 1, 111).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3(9) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(9), provides:

> The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), provides:

> Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

ERISA § 402(b), 29 U.S.C. § 1102(b), provides:

> Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

ERISA § 502(a), 29 U.S.C. § 1132(a), provides:

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary,or by a participant, or beneficiary for appropriate relief in the case of a violation of section 1025(c) of this title;

> (5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or
>
> (6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

STATEMENT OF THE CASE

This action arises from a plan sponsor's termination of non-vested employee welfare benefits under a unilaterally adopted plan. On November 30, 1983, Curtiss-Wright Corporation terminated plan health insurance benefits for respondents and other nonbargaining unit retirees from its Wood-Ridge, New Jersey, facility when it closed that facility due to the loss of a military contract essential to its continued operation.[2] (A.3, 6; J.A. 778-79, 1102-03). Respondents filed suit in the United States District Court for the District of New Jersey, asserting, *inter alia*, a claim for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Respondents invoked the District Court's jurisdiction under ERISA § 502(f), 29 U.S.C. § 1132(f), and under 28 U.S.C. § 1331.

In 1976, in order to bring its benefit plans into compliance with ERISA, Curtiss-Wright established a Constitution as a general plan instrument. (App. 4). In addition to reserving the Company's right to terminate the plan "for any reason at any time," the Constitution provided:

> The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan.

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[2] Under the plan, all affected retirees had the option of converting to individual policies. (J.A. 680).

(*Id.*) Other plan and nonplan documents distributed to participants also reserved these rights. (App. 4-5, 35-36, 67-69).

The Constitution incorporated as plan documents other materials setting forth the terms and conditions of benefits more specifically, including current summary plan descriptions. (App. 4; J.A. 1234-35, 1252). In early 1983, Curtiss-Wright issued a revised summary plan description in connection with a change in insurance carriers, as it had done in the past. (App. 5). The District Court found that this 1983 document governed the terms of the plan applicable to plaintiffs. (App. 36, 38-39).

The amendment at issue is set forth in this 1983 plan document:

> Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired.

(App. 5-6). This language was added to the plan by the Company's Corporate Director of Benefits and its Labor Counsel, with the approval of its Executive Vice President—the same executives who had established the plan Constitution in 1976 and who were responsible for administering the plan. (J.A. 1141-42, 1204, 1235-36).[3]

After trial, the District Court found as trier of fact that Curtiss-Wright had reserved before 1983 the rights to terminate or amend the plan and held that plaintiffs' benefits had not vested. (App. 35-36). The District Court concluded, however, that the lawfulness of the termination of plaintiffs' benefits depended on the validity of the 1983 amendment. (App. 37). Although the District Court found that the amendment had been incorporated in a "governing document" of the plan

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[3] Because Curtiss-Wright already had reserved the right to terminate the plan "for any reason at any time" (App. 4), Curtiss-Wright maintained and its representatives testified at trial that they did not regard the term added in 1983 as changing substantive rights of the parties. (J.A. 1142, 1236-39).

applying to plaintiffs and that plaintiffs had received timely notice of the amendment, it held that the amendment was invalid because the plan did not provide an amendment procedure. (App. 37-39). The District Court entered judgment requiring Curtiss-Wright to pay $2,681,086 in past benefits to plaintiffs. (App. 105).

On appeal, the Court of Appeals for the Third Circuit agreed that, although Curtiss-Wright had reserved the rights to amend or terminate the plan and plaintiffs' benefits had not vested, Curtiss-Wright did not properly terminate those benefits. (App. 2). In its original opinion, the Court rejected Curtiss-Wright's argument that its express reservation of the right to terminate the plan for any reason encompassed the lesser right to terminate plaintiffs' benefits without amending the plan because, the Court reasoned, Curtiss-Wright would still have been required to comply with "termination procedures" prescribed by ERISA § 4041(b), 29 U.S.C. § 1341(b), for certain pension plans. (App. 23-25). On rehearing, the Court vacated its original decision and issued a new opinion, no longer relying on § 4041(b), and instead rejecting the argument on the ground that the notice provided to plaintiffs of the amendment and of the termination of their benefits did not constitute "notice of plan termination" under ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1). (App. 12). The rest of the Court's decision remained unchanged.

The Court affirmed the finding of a violation of § 402(b)(3), which requires a procedure for amendment and "identifying the persons who have authority to amend the plan." Although ERISA § 3(9), 29 U.S.C. § 1002(9), defines "person" to include a "corporation," the Court of Appeals found noncompliance with § 402(b)(3) because Curtiss-Wright's plan provided for amendment by "the Company" rather than by specific individuals. (App. 8). Although the amendment had been incorporated in a plan document distributed to plan participants, the Court reasoned that the statutory purpose of ensuring that participants can rely on the plan documents required striking the amendment. (App. 10-11).

The Court of Appeals therefore affirmed the District Court's judgment. (App. 16).

REASONS FOR GRANTING THE WRIT

By holding that the amendment provision in Curtiss-Wright's plan failed to comply with § 402(b)(3) of ERISA and that the amendment at issue was invalid, the decision below unsettles countless employee benefit plans. Many plans, including any that follow prototype plans approved by the Internal Revenue Service, have amendment provisions substantively identical to the one in Curtiss-Wright's plan. Under the decision below, all of those plans violate § 402(b)(3). Many, if not all, of those plans also have been amended over the years. Under the decision below, the terms of any such plans are now uncertain: Any amendments—including those that for years have been included in the plan documents and followed as controlling plan terms—may be invalid. The liability imposed on Curtiss-Wright portends the possible liability of numerous other sponsors, administrators, and fiduciaries who have amended plans or enforced or followed plan amendments.

The two questions presented by this petition have importance commensurate with this far-reaching impact. Further, the second question presented is one on which the Courts of Appeals have disagreed. Curtiss-Wright's amendment likely would have been upheld in the Fourth, Sixth and Seventh Circuits despite the violation of § 402(b)(3) found below.

The questions presented are important and substantial for another reason. The decision below construes and applies § 402(b)(3) to create both a requirement—that plans identify specific individuals to amend the plan—and a remedy for noncompliance—automatic invalidation of amendments—that ERISA does not expressly impose. In doing so, it weakens two fundamental statutory policies. First, by failing to distinguish between a violation of § 402(b)(3) that causes substantive harm and one that does not, and thereby imposing lia-

bility out of all proportion to any harm, the decision below upsets ERISA's balance between the regulation of benefit plans and the costs of compliance. Second, by striking a term set forth in the plan documents, the decision conflicts with the purpose of ERISA's written instrument and disclosure requirements: to ensure that the current plan documents define a plan's current terms.

Since the consequence of a failure to comply with § 402(b)(3) is not expressly defined by ERISA, it should be defined by reference to these basic policies. Curtiss-Wright submits that this Court's intervention is required to protect these policies and to protect innumerable plans, and the persons associated with them, from unintended and unnecessary burdens.

I. The Questions Presented Have Broad and Immediate Importance.

The decision below already has been followed to invalidate amendments in other plans.[4] Indeed, it puts in violation of § 402(b)(3) any plan using standard amendment clauses. Plans following prototype forms distributed by the Internal Revenue Service do not comply with the statute as construed below; they provide as to amendment only that "The sponsoring organization may amend any part of the plan." 7 *Pension and Profit Sharing 2d* (R.I.A. 1992) at 104,569 (reprinting a form distributed by the Internal Revenue Service to sponsors of master and prototype pension benefit plans). Plans following

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[4] *See Lacilento v. H&M Consolidation Services, Inc.*, Civ. No. 92-2331 (DRD) (D.N.J. 1994) (invalidating an amendment capping benefits under a health insurance plan which provided that the "Company shall have the authority to amend the plan"); *see also Algie v. RCA Global Communications Inc.*, 89 Civ. 5471 (MJL), 1994 WL 132358 at pp. *20-22, 1994 U.S. Dist. LEXIS 4735 at pp. **64-69 (S.D.N.Y. 1994) (stating that an employer-sponsor could not lawfully have amended or terminated a severance benefits plan which "reserve[d] to the sponsor the authority to amend or terminate the plan at any time" but failed to specify a procedure or identify individuals with amendment authority).

other standard forms similarly fail to comply under the decision below. *See* 5A Rabkin & Johnson, *Current Legal Forms* (M. Bender 1993), Form 13.01 at 13-1021 and Form 13.03 at 13-1081 ("The Plan may be amended . . . by the Company"); *Corbel Pension Plan Forms* (1992) at DB-8-301 ("The Employer shall have the right . . . to amend the Plan . . . . However, any amendment which affects the rights, duties or responsibilities of the Administrator may only be made with the Administrator's written consent"). *See also, e.g.*, Sherwin P. Simmons, "Third Circuit Shocks Pension Practioners," 63 Tax Notes 335 (April 18, 1994).

The decision below has immediate and serious consequences for these plans and the persons associated with them. First, plan sponsors, administrators, fiduciaries, and plans themselves face enormous potential liabilities for past actions. While plan sponsors may attempt to conform plans *prospectively* to the construction of § 402(b)(3) announced below, the invalidation of prior amendments changes plan terms *retrospectively*. As a result, actions previously taken in good faith in accordance with amended plan terms and reservations of right become unlawful. The resulting exposure is not limited to plans under which benefits—even, as in this case, nonvested benefits—were terminated. It exists wherever there have been amendments substantively affecting benefits: for example, changing how benefits are funded, accrued, calculated or vested, or changing levels or forms of insurance coverage.

Second, the decision below makes it difficult even to determine the current terms of many plans. Any term added by amendment since the enactment of ERISA almost 20 years ago must be isolated and evaluated. That is a daunting task for plan sponsors, administrators, and fiduciaries, particularly since amendments long ago incorporated in the plan documents generally will be indistinguishable from other plan terms. Nonetheless, under the decision below, it is a task they must undertake to avoid enforcing and following plan terms that may later be found invalid.

Until and unless this Court intervenes, the uncertainties created by the decision below will continue. Such uncertainties, and the potential liabilities they carry, burden the administration of employee benefit plans across the country. This substantial burden is unnecessary and intolerable under ERISA and should be removed.

II. The Decision Below Conflicts with the Decisions of Other Courts of Appeals.

Two other Courts of Appeals have directly addressed whether a violation of § 402(b)(3) may invalidate a plan amendment. Both reject the essential premise of the decision below: that the validity of an amendment depends on the plan's compliance with § 402(b)(3).

In *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990), the Court of Appeals for the Sixth Circuit upheld an amendment to a severance benefit plan that, since it previously had been unwritten, contained no amendment provision at all. The Court found nothing in § 402(b)(3) requiring that the amendment be invalidated:

> We do not believe . . . that Congress intended that any plan failing to comply with section 1102(b) [ERISA § 402(b)] would, for that reason alone, become unamendable. Plaintiffs have failed to show any detrimental reliance based on the defendant's failure to comply with section 1102(b), and, under these circumstances, we decline to impose the substantive remedy of prohibiting plan amendment in response to defendant's procedural violations.

905 F.2d at 949.

In *Biggers v. Wittek Industries, Inc.*, 4 F.3d 291 (4th Cir. 1993), the issue arose again in the context of a severance benefits plan that contained no amendment provision and, therefore, failed to comply with § 402(b)(3). The Court of Appeals for the Fourth Circuit agreed with the conclusion in *Adams*

that an amendment's validity does not depend on compliance with § 402(b)(3). 4 F.3d at 295. As did this Court in *Firestone Tire & Rubber Corp. v. Bruch*, 489 U.S. 101, 110-11 (1989), the Court then looked to analogous trust principles for guidance:

> A situation much like the one before us occurs in trust law when a settlor reserves the power to modify or revoke a trust, but fails to specify a method for implementing changes. If such power is reserved, then the settlor may exercise the power in any manner that "sufficiently manifests his intention to modify the trust."

4 F.3d at 295, quoting *Restatement, Second, of Trusts* § 331, comment c. *See also* G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 993 at pp. 233-39 (2d rev. ed. 1983); W. Fratcher, *Scott on Trusts* § 331 at pp. 378-81 (4th ed. 1989).

The Court below addressed neither *Adams* nor *Biggers*, citing instead *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246 (7th Cir. 1991). (App. 10-11). *Albedyll*, however, comports with *Biggers* and *Adams*. In *Albedyll*, the Court invalidated a putative amendment that conflicted with an amendment procedure expressly set forth in the plan as a "limitation on amendments." 947 F.2d at 254-55. As in *Biggers*, trust principles supplied the rule:

> If the settlor reserves a power to modify the trust only in a particular manner or under particular circumstances, he can modify the trust only in that manner or under those circumstances.

947 F.2d at 254, quoting *Restatement, Second, of Trusts* § 331, comment d. The Seventh Circuit did not suggest that a failure to comply with § 402(b)(3) prohibited plan amendments. To the contrary, the Court noted that the plan before it did not require that its amendment procedure be followed for one of the amendments there at issue. 947 F.2d at 251 n.7. The Court held that this amendment was valid, *id.* at 255, even though it was promulgated without a written amendment procedure. The conclusion that the Seventh Circuit aligns with the Fourth and

Sixth Circuits and not the Third Circuit on this issue is buttressed by *Murphy v. Keystone Steel & Wire Co.*, ____ F. Supp. ____, 1994 WL 172252 at pp. **11-14, 1994 U.S. Dist. LEXIS 5890 (C.D. Ill. 1994), in which the Court, concluding that the Seventh Circuit would reject *Schoonejongen* and follow *Biggers* and *Adams*, upheld an amendment despite the absence of an amendment procedure.

Under each of these decisions, the amendment struck down below would have been upheld. The amendment was incorporated in the plan documents as a plan term, its manner of adoption did not conflict with the plan documents, and any procedural defect caused no harm to participants. Indeed, there could be no more certain manifestation of an employer's intent to modify an employee benefit plan than the incorporation of a new term in the plan documents.

This conflict underscores the need for immediate review by this Court. The split among the circuits aggravates the uncertainties imposed on employee benefit plans and their sponsors, administrators, and fiduciaries. As in this case, a single plan may be administered or the sponsor may be found in two or more circuits. Because different Courts of Appeals do not agree on how the validity of plan terms added by amendment should be determined, the terms of a single plan may vary depending on who gets to which courthouse first. Even the terms of a plan applying only within a single circuit depend on what rule that circuit follows.

Employers, and other sponsors, administrators, and fiduciaries, cannot wait for the issue to percolate further in the lower courts. The uncertainties and potential liabilities they face, the difficulty of administering plans whose terms may vary predictably or unpredictably by location, and the resulting increase in the costs of maintaining employee benefit plans are all too great. Again, until and unless this Court intervenes, those burdens will continue.

III. The Decision Below Weakens Fundamental Policies of ERISA.

A. The Decision Creates a Requirement and a Remedy Not Imposed by the Statute.

This Court itself has refused to rewrite ERISA by inferring obligations and remedies Congress did not expressly provide. *See Mertens v. Hewitt Associates*, 508 U.S. ____, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (holding that ERISA § 502(a)(3) does not authorize an action against a nonfiduciary who allegedly participated in the plan fiduciaries' wrong); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147-48 (1985) (holding that ERISA § 409(a) does not authorize an action for extra-contractual damages). The decision below, however, does just that.

First, the decision below creates a new requirement by redefining a statutorily defined term. ERISA § 402(b)(3) requires a procedure to identify "persons who have authority to amend the plan." ERISA § 3(9) defines "person" to include a "corporation." 29 U.S.C. § 1002(9). But the decision below ignores this definition: It holds that the amendment procedure "by the Company" fails under § 402(b)(3) because the procedure does not identify "what individuals or bodies within the Company could promulgate an effective amendment." (App. 8). Nothing in § 402(b)(3) requires a plan to identify specific individuals within a corporation who have amendment authority.

Second, the decision creates a draconian remedy for noncompliance with § 402(b)(3)—automatic invalidation of plan amendments—not found in the statute. On its face, § 402(b)(3) addresses neither the validity of plan amendments nor an employer's right to amend; it sets forth only a disclosure content requirement. Consistently, § 402(b)(1) does not condition the validity of plan funding on its requirement that the plan "provide a procedure for establishing and carrying out a funding policy," and § 402(b)(4) does not condition the

validity of plan payments on its requirement that the plan "specify the basis on which payments are made to and from the plan." Nor does effective enforcement of § 402(b)(3) require the automatic invalidation of plan amendments. A participant or the Secretary of Labor, for example, can sue under § 502(a)(3) or § 502(a)(5) for injunctive relief compelling a plan sponsor to set forth a procedure for amendment in the plan documents. 29 U.S.C. §§ 1132(a)(3), 1132(a)(5).

The construction and application of § 402(b)(3) below conflicts with the statutory language and scheme. It is therefore intolerable. It is particularly so, however, because it also undermines fundamental statutory policies.

B. The Decision Upsets the Balance of ERISA's Regulation of Benefit Plans and Compliance Costs.

ERISA carefully balances the regulation of benefit plans and the costs of compliance. "There is a 'tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs.' " *Mertens v. Hewitt Associates*, *supra*, 113 S.Ct. at 2072, 124 L.Ed.2d at 174 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981); bracketed material added by the Court). Congress was concerned lest excessive costs discourage employers from offering and maintaining benefit plans at all. *See, e.g.*, H. Rep No. 93-533, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4639-40 (Educ. and Labor Comm.); S. Rep. No. 93-383, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4890 (Finance Comm.). *See also Alessi*, 451 U.S. at 515.

This balance is fundamental to ERISA's remedial scheme and, particularly, to the extent to which ERISA imposes liability for noncompliance with its regulatory provisions. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). Thus, this Court has refused to create liabilities that ERISA does not expressly impose. *See Mertens v. Hewitt Associates*, *supra*; *Massachusetts Mut. Life Ins. Co. v. Russell*, *supra*. The same balance underlies holdings that procedural violations of

ERISA do not give rise to substantive relief affecting benefit entitlements, at least not in the absence of specific harm. *See, e.g., Lewandowski v. Occidental Chemical Corp.*, 986 F.2d 1006, 1008-10 (6th Cir. 1993); *Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743-44 (7th Cir. 1991); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1167-70 (3d Cir. 1990); *Adams v. Avondale Industries, Inc., supra*, 905 F.2d at 949; *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353-54 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985); *Govoni v. Bricklayers, Masons & Plasterers*, 732 F.2d 250, 252 (1st Cir. 1984).

This case presents a stark example of how the statutory balance may be upset by judicial intervention. The only violation found below was that Curtiss-Wright's plan did not have a sufficient amendment procedure. No participant was less informed of the possibility of amendment because of this violation. Nor was any participant less informed of the amendment at issue once it was made. Indeed, the amendment was promulgated in a way that ensured disclosure: It was incorporated in a revised plan document distributed to participants. Nor was any participant less certain of the amendment's authority. From the perspective of participants reviewing a revised plan document issued by Curtiss-Wright, the revisions incorporated in that document could only have been perceived as made "by the Company."

As a result, the liability imposed on Curtiss-Wright bears no relation to the violation found. The decision below thwarts Curtiss-Wright's acknowledged rights to amend the plan and terminate benefits, holding the Company liable for $2,681,086 for terminating nonvested benefits. By contrast, no one has identified any harm to any plan participant from the plan's failure to specify a "person" other than "the Company" to amend the plan or otherwise to provide a more detailed amendment procedure.

For employee benefit plans in general, the Third Circuit's ruling thus has precisely the effect ERISA was intended to avoid. Employers are faced not only with the uncertainty of whether or not their plans comply with § 402(b)(3)—a dis-

tinction the Court below holds to depend on differences as slight as that between "modification by the Trustees" and "modification by the Company"[5]—but with the threat of immense liability for noncompliance. This possibility provides a substantial disincentive against creating and maintaining employee benefit plans.

A substantive remedy may be appropriate if a violation of § 402(b)(3) causes substantive harm to plan participants. *See Biggers v. Wittek Industries, Inc.*, *supra*, 4 F.3d at 296 n.1; *Adams v. Avondale Industries, Inc.*, *supra*, 905 F.2d at 949. But the general rule laid down by the Third Circuit fails to correlate the remedy and the harm—in this case, there was no harm. Curtiss-Wright respectfully submits that, by elevating procedure over substance, the decision below upsets a critical balance underlying ERISA.

C. The Decision Below Erodes the Integrity of the Plan Documents.

ERISA § 402(a)(1) requires that "[e]very employee benefit plan . . . be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). It and § 402(b)(1) serve a common purpose: to ensure that "every employee may, by examining the plan documents, determine exactly what his rights and obligations are under the plan." H. Conf. Rep. No. 92-1280, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5077-78. This common purpose reflects a compelling policy under ERISA. Thus, courts have held that the plan terms as set forth in the plan documents cannot be modified, invalidated, or otherwise disregarded based on ERISA reporting and disclosure violations. *See* cases cited at p. 15, *supra*. Further, courts have held that the plan terms cannot be modified by informal communications. *See, e.g., Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1265

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[5] App. 8, distinguishing *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990), *cert. dismissed*, 113 S.Ct. 1070 (1993).

(10th Cir. 1988); *Nachwalter v. Christie*, 805 F.2d 956, 959-61 (11th Cir. 1986); *but see Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990).

The Court below recognized this fundamental policy: "[T]he participants are entitled to rely upon the plan document as defining the benefits currently being provided." (App. 10). It further observed that § 402(b)(3) "provides certainty and protects participants against frustration of their legitimate expectations" by ensuring "that employees understand how their rights may be modified in the future." (App. 9 n.4, 10).

By striking an amendment set forth in the plan documents, however, the Court's decision takes away more certainty than it provides. Section 402(b)(3) promotes the clear identification of what statements are intended to amend the terms of an employee benefit plan. That purpose is fulfilled, however, once an amendment is incorporated as a plan term in the plan documents. *Cf.* 29 C.F.R. § 2520.104a-4(b)(2) (the requirement that a description of a material plan modification be filed with the Secretary of Labor is fulfilled by filing a plan description or summary plan description incorporating the modification).

By contrast, the potential invalidation of amendments incorporated in plan documents means that plan documents are no longer dispositive of plan terms. Participants cannot rely on the current plan documents because any variations from prior plan documents would have to be evaluated by reference to the manner by which the changes were made—a matter not reflected in the plan documents and often beyond an employee's ability to discover. A participant's dilemma is worsened because, once incorporated in the plan documents, an amendment is indistinguishable from other plan terms. The particular certainty the decision below seeks to ensure—participants' knowing precisely the procedure for modifying their rights in the future—provides little benefit if participants cannot rely on the current plan documents to ascertain the present plan terms.

The theory of the Court below that its remedy "enforce[s] the plan as written" rather than alters the plan terms is not correct. (App. 10). The Court reasoned that "[u]nless and until the written plan is altered in a manner, and by a person or persons, authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan." (*Id.*) The judgment affirmed below, however, does not enforce the terms of the plan as it was originally established—whether that would be when Curtiss-Wright first provided health benefits to its employees, when in 1966 it first provided health benefits to retired employees, or when in 1976 Curtiss-Wright established the plan instruments under ERISA. Instead, the plan terms purportedly enforced by the courts below are those set forth in the 1983 plan document, with the sole exception of the termination clause at issue. (App. 38). The plan terms as stated in that plan document vary in many particulars from those stated in previous documents. To apply the Court's reasoning consistently, each provision in the 1983 plan document would have to be compared with prior provisions; if it varies, then its validity would have to be evaluated based on how the change was made. Indeed, if the decision below stands, all plan terms added by amendment are potentially vulnerable to being stricken judicially.

The Third Circuit attempts to confine its holding to amendments "advantageous to the sponsor's interest." (App. 11 n.5). This also fails to avoid the underlying problem, for at least two reasons. First, not all plan amendments may be easily categorized as advantageous to either the sponsor's or participants' interests. Even an amendment terminating or limiting benefits for certain participants, such as the amendment at issue here, advantages other participants if it contributes to the continuation of the plan as a whole. Other amendments—such as a change in health insurance carriers accompanied by an increase in both maximum coverage amounts and deductibles—also defy categorization. Second, the integrity of the plan documents cannot depend on whether terms favor the sponsor or the participants. Participants are not the only

ones entitled to rely on the plan documents. The plan sponsor is entitled to rely on plan documents as fixing the extent of its obligations;[6] plan administrators and other fiduciaries are required to rely on the plan documents in fulfilling their responsibilities. Parties can rely on the current plan documents only if the terms set forth in those documents, whether advantageous or not, are the plan terms.[7]

There may be room to invalidate putative plan amendments based on violations of § 402(b)(3) in certain circumstances without infecting the plan documents with uncertainty. But the general rule announced below is too broad because it invalidates terms set forth in the plan documents. The rule provided by trust law better serves the statutory purpose: When the right to amend is reserved but no procedure for amendment specified, the validity of a putative amendment depends on whether there was "a clear manifestation of an intent to alter the policy or plan." *Biggers v. Wittek Industries, Inc.*, *supra*, 4 F.3d at 295-96. From any perspective, and particularly that of a plan participant, there is no clearer manifestation of a plan sponsor's intent to amend a plan than its revision of the plan documents.

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[6] As are the stockholders, creditors, and other persons to whom a sponsor may be required to report its liabilities.

[7] The Courts of Appeals overwhelmingly have acknowledged this by refusing to enforce informal, "extra-plan" communications allegedly modifying benefits from those provided under the plan documents—whether to increase or decrease benefit entitlements. *See* cases cited at pp. 16-17, *supra*.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari on both of the questions presented.

Respectfully submitted,

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